REGISTERED No. D. 221

The Gazette of India

EXTRAORDINARY

PART II—Section 3

PUBLISHED BY AUTHORITY

No. 479] NEW DELHI, MONDAY, OCTOBER 14, 1957/ASVINA 22, 1879

ELECTION COMMISSION, INDIA

New Delhi, October 4, 1957/Asvina 12, 1879 Saka

S.R.O. 3277.—Whereas the election of Maulana Abdul Shakur, son of Shri Shujat Ali, resident of Inderkot, Ajmer, as a member of the Council of States by the elected members of the Ajmer Legislative Assembly, has been called in question by an election petition presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Rikhab Chand, son of Shri Deep Chandji, Aryanagar, Ajmer;

And whereas, the Election Tribunal appointed by the Election Commission, in pursuance of the provisions of section 86 of the Representation of the People Act, 1951, for the trial of the said petition, sent a copy of its order dated the 31st January, 1957, in pursuance of the provisions contained in section 103 of the said Act;

And whereas the Supreme Court, on an appeal by the respondent, has set aside the said order of the Tribunal;

Now therefore, in pursuance of the provisions of section 106 of the said Act, the Election Commission hereby publishes the said orders of the Election Tribunal and the Supreme Court.

IN THE COURT OF THE ELECTION TRIBUNAL, AJMER

PRESENT

Shri C. Jacob, *Chairman*

Shri G. D. Badgel, *Judicial Member*

Shri S. N. Agarwal, Advocate, *Member*, Ajmer

Thursday the 31st January, 1957

ELECTION PETITION No. 2 *of* 1956

Shri Rikhab Chand s/o Deep Chandji, Arya Nagar, Ajmer—*Petitioner.*

Versus

Maulana Abdul Shakur s/o Shri Shujat Ali residing in Inderkot, Ajmer—*Respondent.*

JUDGMENT

S. N. Agarwal—G. D. Badgel—*Members*:

1. This is a petition under s. 81 of the Representation of the People Act, 1951, challenging the election of the respondent as a member for the Council of States from the Electoral College, for the State of Ajmer, and praying *inter alia* that the election of the respondent be declared void and the petitioner be declared duly elected.

2. The facts alleged in the petition are as follows: the Hon'ble the President of the Union of India on 17th February, 1956, *vide* notification No. SRO 430 published in the Gazette of India Part II section 3 dated 17th February, 1956

called upon the members of the Electoral College for the State of Ajmer (besides others) to elect a member for the Council of States on or before 31st March 1956. The Central Government on 17th February 1956 fixed 1st March, 1956 as the last date for filing nominations and 5th March 1956 as the date for their scrutiny. The Returning Officer for the State of Ajmer, in consequence of this fixing of the dates had issued notification on 17th February 1956 inviting nominations for the Council of States from the members of the Ajmer Legislative Assembly on or before 1st March 1956 between 11-00 A.M. to 3-00 P.M. The respondent Maulana Abdul Shakur filed three nomination papers for the said election, first two having been filed on 28th February 1956 and the third on 1st March 1956. The petitioner also filed his nomination paper for the same election and is a duly nominated candidate for the same, his serial number being 228 in Ward No. 31 of the Ajmer town, Ajmer North Parliamentary Constituency. There were thus two candidates only who had filed nomination papers for election as a member for the Council of States from the Electoral College for the State of Ajmer, that on 5th March 1956 the date fixed for scrutiny of nomination papers the petitioner raised certain objections to the nomination papers of the respondent, chief of them being that the respondent was in service of the school run by the Dargah Khwaja Sahib, Ajmer and was getting Rs. 100 per month and also that the Government of India had undertaken the administration of the Dargah Khwaja Sahib, Ajmer and the respondent was serving as the head of the school run by Durgah Khwaja, Ajmer. The respondent filed a reply to these objections but he neither admitted nor denied whether he was getting Rs. 100 per month as alleged by the petitioner. The Returning Officer by his order dated 6th March 1956 held that so far as the first and second nomination papers of the respondent were concerned, he was holding an office of profit and rejected the said nomination papers, but for the third nomination paper of the respondent, it was held by him that in view of the provisions of the new Dargah Act No. XXXVI of 1955 which had come into force on 1st March 1956, the respondent was not holding an office of profit and hence he accepted the third nomination paper. The selection took place on 22nd March 1956 and the respondent was declared elected and the result of the election was published in the Gazette of India Extraordinary Part II Section III dated 31st March 1956.

3. The petitioner has thereupon pleaded that the election of the respondent was void and that the petitioner has been duly elected for reasons given in paras 15(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), and (o) of the petition, the gist of them being (1) that the respondent being Mohatmim or manager of Madarsa Usmania Dargah Khwaja Sahib, Akbari Masjid, Ajmer, held an office of profit under the Government and was thus disqualified under s. 102(1) (a) of the Constitution of India, (2) that the respondent having taken a share or interest in the administration of the Dargah *viz.* the imparting of education, was disqualified under s. 7(d) of the Representation of the People Act No. XLIII of 1951, (3) that the Returning Officer acted contrary to law in accepting the third nomination paper of the respondent after rejecting the first two, (4) that the acceptance of the third nomination paper of the respondent was also not correct as the provisions of Art. 102(1) (a) of the Constitution of India, and s. 36 of the Representation of People Act were not correctly applied by the Returning Officer in interpreting the provisions of the Dargah Emergency Provisions Act, 1950, the new Dargah Act No. XXXVI of 1955 and the General Clauses Act, and (5) that the nomination of the respondent should have been rejected and the petitioner being the only validly nominated candidate should have been declared elected unopposed as he had received the majority of the valid votes or rather all the valid votes because the votes cast in favour of the respondent should be considered as thrown away, he being disqualified for election.

4. The petitioner has along with the petition filed a list of the illegalities and irregularities which were committed in the elections. This list contains nothing else but the various items of paras 15(a) to (o) of the petition.

5. The respondent Maulana Abdul Shakur had filed a written statement to the petition on July 6, 1956, therein he had admitted the notification by the President of India calling upon the members of the Electoral College for the State of Ajmer to elect a member for the Council of States, filing of the nomination papers by the parties *viz.* one by Shri Rikhab Chand Jain, and three by Maulana Abdul Shakur, the raising of the objections by the petitioner to the nomination of Maulana Abdul Shakur to the effect that he was holding an office of profit under the Government of India and was taking share in the administration of the Dargah Khwaja, Ajmer, by serving as head of the school run by the Dargah and also the rejection of the first two nomination papers and acceptance of the third nomination paper of Maulana Abdul Shakur and his subsequent election on 22nd March 1956 as member of the Council of States from Ajmer Electoral College. The rest of the allegations made in the

petition were denied by the respondent Maulana Abdul Shakur who on the other hand pleaded that the petition did not disclose any cause of action, that the Madras Usmania Dargah Khwaja Sahib, Akbari Masjid, Ajmer, was quite independent of the Dargah Endowment which has its own funds and resources quite distinct, separate and independent of the Government of India, that the servants of the Dargah Khwaja Sahib Endowment were not the servants of the Government of India and that the verification of the petition was defective. It was also contended by the respondent that the petitioner was not a validly nominated candidate and could not have legally contested the election nor could have been declared elected.

6. The petitioner made two applications on 16th July 1956; one under Order 6 rules 6 and 16 C.P.C. read with section 90 of the Representation of the People Act, 1951, praying that the respondent be called upon to furnish the better particulars of the allegations made in para 15(a) and 15(b) of the petition and that no issue be framed on the allegations made in para 3 of the additional pleas in the written statement and the other being under s. 97 of the Representation of the People Act, 1951 wherein it was prayed that the allegations made in paras 4 and 12(m) of the written statement regarding the validity of nomination of the petitioner or questioning his right to have been elected be struck off or be ignored and that the allegations made in para 12(f) and (g) of the written statement contesting the validity of the Returning Officer's order rejecting the nomination papers of the respondent filed on 28th February 1956 be struck off or be ignored. Notice of these two applications was given to the respondent who filed his reply to both the applications on 21st July 1956. After hearing the counsel for the parties, the tribunal ordered on 28th July 1955 on the former application that so far as the objection regarding the defective verification of the petition was concerned, it was of no force and was rejected. By the same order, the respondent was directed to reply to the allegations regarding Mohtimimship of the respondent mentioned in para 15(a) and (d) of the petition. On the application under s. 97 of the Representation of People Act, 1951, it was also ordered on 28th July 1956 that the tribunal was of the opinion that it would be proper to frame an issue regarding the petitioner's contention that the respondent should have filed a recriminating petition under s. 97 challenging the nomination of the petitioner or rejection of the respondent's two nomination papers filed on 28th February 1956 within the prescribed time of 14 days from the publication of the Election Petition, in the Government Gazette. It was also ordered that the subsidiary issue can also be framed whether such a plea was open to the respondent or not.

7. The respondent filed better particulars as per orders passed on 28th July 1956 on which date the following issues arising from the pleadings of the parties and the better particulars filed by the respondent, were framed :—

1. Is the petitioner not a duly nominated candidate? Can the respondent question the validity of the nomination of the petitioner in view of Section 97 of the Representation of the Peoples Act?

2. Does the respondent hold an office of profit under the Government of India as alleged by the petitioner?

3. Is the respondent disqualified under section 7(d) of the Representation of Peoples Act?

4. Has the Returning Officer acted in contravention of the provision of section 36(3) of the Representation of the Peoples Act in accepting the third nomination paper of the respondent? If so what is its effect?

5. Were the first two nomination papers of the respondent wrongly rejected by the Returning Officer and can the respondent question the same without filing recriminating petition?

6. Did the respondent continue to be disqualified as alleged in para 15(f) of the petition?

7. Should the votes cast in favour of the respondent be treated as thrown away and has the petitioner obtained the majority of valid votes or all the valid votes?

8. Should the election of the respondent be declared as void, and the petitioner be declared as duly elected?

8. *Issue No.* 1.—The burden of this issue was on the respondent. Nothing was shown at the time of arguments by the counsel for the respondent as to how the petitioner was not a duly nominated candidate. On the other hand, the petitioner filed two nomination papers Ex. P/4 and P/5. The Returning Officer accepted the same. The petitioner also produced an electoral roll of Ajmer North Parliamentary Constituency in which his name finds place at serial No. 228 which is marked Ex. P/8. It is therefore clear that he is a duly nominated candidate We are also of the view that according to section 97 of the Representation of People Act, 1951, the respondent cannot challenge the nomination of the petitioner without filing a recrimination petition.

9. *Issue No.* 2.—This is the most important issue for the disposal of the case and at the same time a very difficult one. These words *e.g.* office of profit under the government have not been defined by the statute and it is not also easy to define these words. For the purpose of determining whether the respondent holds an office of profit under the Government, it is necessary to determine three factors *viz.* office, profit and the fact whether it is held under the Government. In Ajmer, in previous election petitions, the question for the determination as to whether an Istimrardar held an office of profit arose and it was disposed of by the Ajmer Tribunal in Election Petition No. 241 of 1952 and others. Two members of this Tribunal happened to be members of the Tribunals which disposed of this question. In those cases, it was held that the essential characteristics of an office of profit were as follows:—

1. It involves an appointment by the State in one form or the other
2. It carries emoluments payable mostly periodically
3. Is for a limited period
4. Is terminable
5. Is not assignable
6. Is not heritable
7. The holder of the office must be *suijuris.*

10. Therefore, it has to be judged in the light of the above characteristics whether the respondent is the holder of an office of profit. In this case, the respondent was appointed as Mohatmim in the school known as Darul-ul-Ulum Monia Osmania, Durgah Khwaja Sahib, Ajmer, and he was getting Rs. 100/- p.m. and the Durgah is administered according to a Statute or formerly by an ordinance issued by the Government. Therefore, whether the respondent should have been appointed by the State or not will be considered later on when we deal with the third point *viz* office of profit under the Government of India. For the present it is sufficient to say that he was appointed to act as a Mohatmim which is apparently an office. It was urged by the learned counsel for the respondent that the respondent could not be said to holding an office because Ex. R/3 through which the respondent was appointed as a Mohatmim does not show duty, but contains the word 'Nigrani' and that there is nothing to show who is to regulate the duties of the respondent and he was wholly independent and he was not bound to attend the school and he could leave Ajmer without any intimation. We are of opinion that Ex. R/3 does contain the duties which were to be performed by the respondent. Ex. R/3 contains the following words:—

HUKM

MAULANA ABDUL SHAKOOR SAHAB KO MOHTMIM DARUL ULOOM MOINEEA USMANIA IJANI TAUR PAR MUKARAR KIA JATA HAI DARUL ULOOM KADARSON TADVEES AUR NAZMON NASK KEE TAMAM TAR JUMMEDARI MOHATIMAM SAHAB KEE HOGI AUR UNAKA TAULLOOK VA RAHE RAST MUJHASE HOGA AUR AAP SHOVAJAT MADRAS DARUL ULOOM VA DARUL EKAMA AUR KUTUB KHANE KE BHEE INCHARGE HONGE.

11. Therefore, it is clear that certain duties were attached to the office of the Mohatmim and the Mohatmim was directly responsible to the Administrator, Durgah Khwaja Sahib until the Act of 1955 came into force after which he became responsible to the Nazim appointed under the new Act.

(2) The respondent was to get Rs. 100/- as an honorarium for the work he did and it was made to run with effect from the date of his appointment which he drew at the relevant period. This is clear from Ex. P/30.

(3) The appointment is for a limited period because he has not been appointed as Mohatmim permanently.

(4) It is inherent in the appointment that the appointment is terminable. There is nothing to show that it is not terminable.

(5) to (7). It cannot be assignable and it certainly is not neritable and the holder of the office is *sui juris*.

12. Therefore applying these tests to the present case, the respondent does seem to be holding an office.

13. Arguments were advanced at the time of hearing by both the sides that for purpose of determination of the office of profit, the date of nomination is material, the petitioner urging that it is the date of the first nomination which is relevant for this purpose, whereas the respondent contended that it is the last date of nomination which should prevail. We are of opinion that it is the last date which is relevant for the purposes of determining whether the nomination of any candidate is valid or not because if a candidate was not qualified on the last date and he was qualified on previous dates when previous nomination papers were filed, it will have to be decided that since the candidate became disqualified on the last date of the nomination paper his nomination could not be certainly held valid with reference to the previous nomination papers although on those dates he was qualified. It is also certain that the nomination papers will have to be considered simultaneously although orders will have to be passed separately in each and every nomination paper by the Returning Officer. The rulings quoted by the learned counsel for the petitioner viz. Doabias Election cases Vol. I at page 36, Case No. 66, 1 E.L.R. 461, 4 E.L.R. 234, 8 E.L.R. 45 do not help the petitioner at all as in none of them the question arose as to whether for the purposes of determining the validity of the nomination or otherwise, the first date of nomination or the last date of nomination is relevant. In those cases, the only point for decision was whether the date of nomination is the relevant date or the date of scrutiny is the relevant date and it was decided that the date of scrutiny is immaterial whereas the date of nomination is the material date. So, those cases related only to the point whether the date of nomination was material or the date of scrutiny was material. In this case, for the purposes of determining whether the respondent was holding an office of profit date will not be material. The date only comes in when we have to consider whether the respondent is holding an office of profit under the Government and this will be done when we consider the above question.

14. Now to determine whether the respondent was holding an office of profit when he was nominated, we will have to decide whether the respondent made any profit out of office held by him. We find on page 893 under article 58 of the Constitution of India by Chitaley and Appurao Vol. I, "It is of course and no doubt it must be an office to which remuneration is in some way or the other attached. You cannot have an office of profit unless you have got the remuneration attached to it. That does not, of course, mean that in any particular year there must necessarily be any remuneration. It is, I should think, clear beyond any controversy—indeed, it was not controverted—that if you take the case, the perfectly possible case, of a holder of an office remunerated by share of profits, and by reason of the fact that in difficult times there are no profits so that there is no remuneration, it is not questioned, I think, and could not be questioned, that that would none the less be an office of profit and would continue to be an office of profit even though for one year or for more than one year no remuneration accrued."

On page 894, we find:—

> "Further, "office of profit" doed not connote that its incumbent *actually* makes a profit from it; if it might reasonably be expected that a man would make a profit of it, it must be considered an office of profit."

On page 895, we find:—

> "In my opinion, where a sum of money is given to an incumbent substantially in respect of his service as incumbent, it accures to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present."

On page 896, we find:—

> "The voluntary foregoing of the remuneration of office does not make the office cease to be one of profit. In Reade V. Brearley Finlay, J., observed as follows:—
>
> "If a person holds an office and the office is an office of profit, it is perfectly clear that no application of the income, which he may think

proper to make as between himself and other persons, can for a moment affect his liability as being the holder of an office of profit. It is, I think, equally clear that—I will not say in every case, because these cases, I think, have to be judged upon their own facts, but I think it is clear that at least in large number of cases the voluntary foregoing of a salary due to a person ought to be regarded by the Court, and would be regarded, simply as being an application of the income and that, in such circumstances, the office would not the less be an office of profit and the assessment would, therefore, not the less be made."

15. These remarks are no doubt based on English cases and it was argued at the time of hearing that the English Law should not be taken as a basis but it is at the same time equally clear that it could be taken as a guide. There are also Indian cases which decided that if the incumbent is paid any remuneration or in any shape or form while holding an office, then it will be an office of profit and if the holder voluntarily relinquishes it or does not draw the remuneration, it will make no difference. In fact, at the time of arguments, it was conceded by the learned counsel for the respondent that the voluntary relinquishment by the holder of the office will make no difference. So far as the facts of the present case are concerned, we find with reference to Ex. P/29 that the honorarium of Rs. 100/- was suggested to be paid to the respondent in order that it might be an incentive to Maulana Sahib, the respondent, Exs. P/27 and P/28 show the name of the respondent appearing as an employee of Durgah Khwaja Sahib, Ajmer, drawing a pay of Rs. 100/- p. m. Some arguments were advanced at the time of hearing whether the respondent drew this amount as pay or as an honorarium, but it was finally conceded that it makes no difference whether the amount is paid as pay or honorarium or in any other shape so long as it is a payment made with reference to an office or in other words it is attached to an office the incumbent must be deemed to hold an office of profit.

16. Moreover the attempt of the opposite party to show that the remuneration was relinquished also does not appear to be an honest and straightforward one because we feel that the document R./5 and Ex R./5A, which have been produced by the opposite party to prove this fact seem to be documents got up later on as no attempt was made to show by relevant documents, for example receipt and despatch registers, that they had been really received and sent on 29th February 1956. It may also be mentioned here that Maulana Abdul Shakoor had admitted in his statement that he had received written intimation from the Nazim that his relinquishment had been approved by him but no such document was produced by him.

17. The opposite party also made an attempt to show that he worked honorarily with effect from 1st March 1956 and he produced Ex P/20 containing several entries to show that. We do not agree with this contention of the opposite party as we think that the word 'Aijazi' in the entries dated 1st March 1956, 5th March 1956 and 8th March 1956 is a clear interpolation.

18. We are constrained to remark that the Durgah Committee failed to co-operate with the tribunal in doing justice as they apparently suppressed certain documents which they had been asked to produce before us by saying that the record and the papers concerned have been taken away by the Nazim to Hyderabad.

19. It was also urged that the respondent was paid Rs. 100/- p.m. on account of out of pocket expenses. We are not prepared to believe this. This case was not put forward by the respondent either before the Returning Officer or in the written statement filed by him before the Tribunal. This has for the first time been introduced by the respondent in the better particulars supplied by him in response to the petitioner's application calling for better particulars. Secondly, no material has been placed by the respondent before the Tribunal as to what out of pocket expenses the respondent had to incur and whether in fact he had at any time incurred any such expenses so as to determine whether in view of those expenses any profit could be made by the petitioner or not. Although, the initial burden to show that the respondent held an office of profit on the date of nomination lay on the petitioner, but it was the duty of the respondent to prove that what he was paid was simply to make up his out of pocket expenses and not as pay or otherwise in the shape of any remuneration for the work he did or office he held.

20. We also do not believe the case of the respondent of voluntary relinquishment. This plea also suffers from the same handicap as that of the theory of out of pocket expenses. Moreover, the learned counsel for the respondent also

urged that the respondent could not be said to hold an office of profit because Ex. P/26 by which the suggestion was made to appoint the respondent a Manager could not be said to be a letter issued from a master to his servant and that the attendance register did not contain the name of the respondent as also Ex. O/21. To us, documents Exs. P/29, P/30 and R/3 appear to be important documents which throw ample light on the subject and which leave no doubt in our mind in deciding that the respondent did hold an office of profit.

21. The next point urged by the learned counsel for the respondent was that the profit is not attached to the office. We are clear on the point that the payment was made to the respondent, because he acted as a Mohatmim and not for any other purpose. It therefore follows that the profit was attached to the office of Mohatmim which was held at the relevant time, by the respondent.

22. Now remains the point whether the respondent is holding office of profit under the Government. The petitioner's case in this connection is that on 1st March, 1956, Act XXXVI of 1955 had come into force, but it made no difference from the earlier Acts or Ordinances prevailing before the present Act came into force. The position remained the same as on 29th February 1956. The Returning Officer had also held that with reference to the previous Acts and Law prevailing upto 29th February, 1956, the petitioner must be held, and he accordingly so held, to hold an office of profit under the Government and he therefore held that the nomination papers submitted by the respondent upto 29th February 1956 were invalid. But the Returning Officer made a mistake when he further held with reference to Act XXXVI of 1955 that a change came in existence by the coming into force of this Act. The petitioner maintains that even according to the present Act it is the Government who is the controlling authority and it appoints the Committee which manages and supervises and controls the affairs and functions of the Durgah. The respondent was an employee of the Committee which functions under the control of the Government. In the present Act even the rules and bye-laws have to be framed by the Committee which are subject to the approval of the Government. Even the Nazim was appointed by the Government. Further argument is that even though the members of the Committee may be deemed to have been exempted from a disqualification, but the employees under the Committee have not been so exempted. The control of the Government may be direct or indirect. The word 'under' in article 102(1)(a) has been used in a broad sense and must be construed to include even office which may be remotely under the control of the State Government. In this connection, the learned counsel for the petitioner quoted 1 E.L.R. 171, 9 E.L.R. 403, 10 E.L.R. 126, 6 E.L.R. 10 and also Hailsbury Law of England 2nd Edition Vol. 24 pages 224 and 226 and Vol. 12 page 137 and 4 E.L.R. 422. He also referred to Maynes Parliamentary Practice at p. 205 in this connection. Whereas the case of the respondent is that the respondent could not be said to hold an office of profit under the Government as there is no control of the Government so far as the appointment or removal of the employees of the Durgah is concerned, that there is no relationship of master and servant between the Government of India or any Government and the employees of the Durgah, that the control of the Government is only directorial, that the amount of remuneration did not come from the cofferes of the Government and that the finding of the Returning Officer so far as the first two nomination papers Ex. P/1 and P/2 were concerned was wrong. His contention was that the respondent could not be said to have held an office of profit under the Government at any time, as according to previous Acts also, the petitioner could not be said to hold an office of profit under the Government. He also referred to Ex. P/22 wherein a sentence occurs that if certain things are affected, the institution will be able to get the aid of the Government there by suggesting that so far the Government had nothing to do with the institution or its employees.

23. We are clearly of opinion that the source of money from which a person is paid is absolutely immaterial. Whatever source the money may be paid from, but if the Government has any hand in the appointment or removal of a person, it must be said that he holds an office of profit under the Government. Section 16 General Clauses Act also says that an appointing authority must be deemed to possess powers of suspension and removal also. It has therefore to be decided whether in this particular case, the Government has got anything to do with the management or control of the affairs of the Durgah under which the respondent is serving as a Mohatmim of the Madarsa. By the present Act No. XXXVI the powers of the Committee have been enlarged. Section 5 of the said Act relates to the composition of the Committee. Section 11 relates to the powers and duties of the Committee. Section 10 gives the power by which the Committee could be superseded. Section 20 relates to the framing of rules.

24. We feel that for the purposes of deciding whether an office of profit is held under the Government or not a distinction will have to be kept in mind whether any person is holding an office of profit under the Government or he is a person serving under the Government. Dargah is an institution which was in the first instance managed by a committee under the Religious Endowments Act. This was directly under the Government. Later on Dargah Act No. XXIII of 1936 and Dargah Act No. XII of 1938 came into force. Sections 11, 16 and 18 of that Act related to the management of the Dargah. Then Ordinance No. XIV of 1949 was enacted by the Government for the management of the Dargah. It directly remained under the control of the Government. This ordinance was replaced by Act No. XVII of 1950 called the Dargah (Emergency Provision) Act, 1950. By this Act no change was made in the management of the Dargah and the control was placed in the hands of an administrator. Section 7 laid down that the management was subject to the control of the Government. This Act was replaced by Act No. XXXVI of 1955. By this the powers of the Committee were enlarged but in this no departure was made so far as the management of the Dargah was concerned. The committee was to be appointed by the Government and so also the first Nazim was to be appointed by the Government. Section 10 laid down that the committee could be superseded. By reference to all these acts it is clear that the management of the Dargah is done by the Government, although it is done through a committee appointed under the provisions of the statutes enacted from time to time. There is practically no difference between a committee and a Nazim for management.

25. Now it has to be seen whether the servants or employees appointed by the committee constituted under the Act or otherwise appointed by the Nazim can be called to be persons holding office of profit under the Government as required by Article 102 of the Constitution of India. In this connection, it will be advantageous to refer to 4 E.L.R. page 422. In this case the Vindhya Pradesh Government appointed District Advisory Councils for each of the eight districts in the State and the members of the Legislative Assembly of the State representing these districts were all appointed members of the respective District Advisory Council. The order of appointment provided that the members will get travelling allowance and daily allowance payable to the members of the Legislative Assembly for the days or day of the meeting. Under the rules the travelling allowance was 1½ first class railway fare and the daily allowance was Rs. 5 for each day of residence at the place where the meetings were held. The question whether the members who had been so appointed had become disqualified to be members of the Assembly was referred by the President to the Election Commission. The Commission was of opinion:—(i) membership of the Vindhya Pradesh District Advisory Councils was an office within the meaning of sections 16 and 17 of the Government of Part 'C' States Act, 1951 read with the provisions of Articles 101 and 102 of the Constitution, and the members held that office under the Government of Vindhya Pradesh, (ii) members of the assembly who had actually attended any meeting of the Council must be said to have held such office. At pages 431 and 432 paras. 17, 19 and 20 say:

26. "17. We may next take up the question as to whether the membership of one of these councils is an "office" at all. On this point, learned discussions were held and reference made to authorities, ancient and modern, from the law prevailing in England, as to what constitutes an "office". The definition of the term "office" was read from several authorities as, for instance, Burrow's Words and Phrases, Tomlin's Law Dictionary Lucc's Legislative Assemblies and several reported English cases; reference was also made to the definition of the term "office of profit" in Iyer's Law Lexicon of British India. The Commission feels that it will not be of very much real assistance if one analyses all the definitions and authorities cited in regard to this matter. Parliamentary life in England has its own peculiar history and tradition going back for many centuries and recourse had to be had there at times, to legal fictions in order to get rid of technical legal difficulties arising directly from the history of development of this branch of Parliamentary law and practice. Compare, for instance, the institution of the Chiltern Hundreds and Manor of Northstead. It would be purposeless, in the view of the Commission, to introduce in its entirety the considerations that obtain in England while dealing with a question like the present one. Although the expression "office of profit" has been adopted in our Constitution and laws, it can hardly mean the same thing technically as it does in England. It would be more reasonable and desirable that we should rather concentrate upon the underlying principles and the real intention of the Constitution in incorporating this salutary provision against the acceptance of certain offices by members of legislatures. Undoubtedly, the intention is to keep the legislatures independent of the executive. It was felt obviously that the Executive Government of the Union, or of a State, should be discouraged from holding

out blandishments to members of the legislatures, so that the latter would be free to carry out their duties to their electorate uninfluenced by any consideration of personal loss or gain. If the Executive Government have untrammelled powers of offering to legislators any appointments, positions or offices, however, they may be described, which carry emoluments of some kind or other with them, there would be a clear risk that an individual member might feel himself beholden to the Executive Government and thus lose his independence of thought and action in his capacity as a member of the legislature and a true representative of his constituents. That will be a very great danger to the proper development of democratic institutions and the democratic way of Government in the country; and this is the likely abuse which the Constitution seeks to prevent by the provisions which we have under consideration at present. If the membership of a committee, council, board or whatever it is, can be made use of by a Government to put a member of a legislature under its obligation in the slightest way, such membership should be regarded as an "office" which would come within the purview of the penal articles of the Constitution.

27. 19. As to how the term "office" is interpreted by our own Parliament reference was made on behalf of the petitioner of section 2(e) of the Parliament (Prevention of Disqualification) Act, 1951 (Act LXVIII of 1951), by which membership of committees set up by the Government of India or the Government of any State was treated as an "office", and it was also envisaged therein that membership of these committees might, in fact, be "offices of profit". On a consideration of the authorities cited and the arguments advanced, as also the underlying principles of our Constitution and the terms and provisions of the Act mentioned above (Act LXVIII of 1951), there can be no doubt left in one's mind that membership of a body set up by Government, like the Vindhya Pradesh District Advisory Councils, is an "office" within the meaning of sections 16 and 17 of the Government of Part C States Act, 1951, read with the provisions of Articles 101 and 102 of the Constitution.

28. 20. We shall next deal with the question as to whether such membership is an office "under" the Vindhya Pradesh Government. The argument was advanced on behalf of the petitioner that the District Advisory Councils having been appointed by the Government itself, they could also be dissolved or dismissed by the same Government, and that this makes its membership an office under the Government. On behalf of the opposite-parties, it was urged on the other hand that before an office can be said to be "under" the Government, there must be some disciplinary or supervisory powers in the Government over the members; and, as in this case there are no such powers reserved to Government, the requirements are not satisfied so as to enable an office like this to be called an office "under" the Government It was further urged that if an office is not under the Government, the independence of a member accepting that office cannot be affected in any way, and consequently, the acceptance of such an office could not be held to come under the mischief of the relevant penal provisions of the Constitution and the law. It appears to the Commission that there is no real substance in the arguments advanced in support of the members. The Councils were created by a mere executive order of the Government, and admittedly that order has already been amended in some respects by a subsequent order of the same Government. There is nothing to prevent the Government from amending the order further in other ways. The members of the Councils accordingly hold their office at the sweet will of the Government. Moverover, the office is one entirely in the gift of the Government, and if, in addition to this, it is remembered that Government can easily make it a source of profit to the members of these Councils and also take away any such profit attaching to the office, there can be no doubt that it should be deemed to be an office "under" the Government. In view of all these circumstances, the Commission is clearly of the opinion that this office must be considered as an office under the Government.

29. The report of the Committee appointed by the Government for consideration of removal of disqualification at page 18 para. 4 and at page 35 and para. 73 is also useful to be referred to in this connection. At page 18 we find the words "as stated earlier the committee have come to the conclusion that the word "under" in Articles 102(1)(a) and 191(1)(a) of the Constitution of India has been used in a broad sense and must be construed to include even offices which may be remotely under the control of the Central or State Government. Again at page 35, "the Committee though have recommended exemption from disqualification of a member of Parliament for being member of these committees are not prepared to treat these office bearers on the same level as ordinary members and recommend that these offices should be treated as offices of profit. Halsbury's Laws of England Volume 24 page 224 may also be referred with advantage here. At page 224 we find "succession to the Crown Act 1707, section 24 which has

been held to apply not only to new offices accepted directly under the Crown but also to new offices the appointment of which is vested in some authority under the Crown". Then at page 226 of the volume we find that the paid chairman, deputy chairman and paid officials of County Council etc. were held to be holding office of profit.

30. In Mayne's Parliamentary Practice at page 205 dealing with statutory board and authorities it was held that although the public authorities were so constituted as to be free in respect of their day to day administration from political or ministerial control, yet some minister in the last resort is responsible for them to control. Hence members or employees of such statutory bodies were held to be disqualified as holding office of profit under the Gvernment.

31. In a case reported in 6 E.L.R. page 19 which was cited by the petitioner it was held that the chairman of the Jodhpur Municipality held an office of profit. This case is not of much help in deciding the case as the case in 6 E.L.R. 10 was decided with reference to the provisions of the Municipal Act which governed the said municipality. Then it will be useful to refer to the report of the Committee at page 57. The committee has said that the employees of local bodies should be treated at par with the Government Servants and should not be exempted from disqualifications.

32. A ruling reported in 7 E.L.R. page 374 was brought to our notice. In it it was laid down that mere power of appointment and dismissal and payment of honorarium from the Government Treasury and general supervision or control cannot make a person a servant of the Government, if he has not agreed to be subjected to at all times to the orders and directions of the Government not only with regard to the nature of the work and also the manner of doing it. It was also said that the unofficial honorary secretary of a District Development Board of the Government of Bombay holds an office of profit but does not hold the office under the Government of Bombay and there is no relationship of master and servant between him and the Government. This case went up to the High Court of Bombay wherein the case was remanded to the Election Tribunal *vide* 8 E.L.R. page 417. On remand the case was considered by the Tribunal and the case is reported at 9 E.L.R. page 451 wherein it has been laid down that the mere fact that a person may be getting an honorarium from the State and may be paid travelling allowance by the State or that the appointing authority is the State or his services are liable to be terminated by the State are not conclusive on the question whether he is serving the State. These are facts that may be taken into consideration but the real test is the right to control the manner in which that person does his work. It was further said that a non-official secretary of a District Rural Development Board in the State of Bombay is not a person serving the Government though he may hold the office of profit under the government and obtaining assistance of such persons would not amount therefore to a correct practice under section 123(8).

33. We, therefore, find that a distinction has clearly been made out for a person holding an office of profit under the Government and a person serving the State. At page 465 we find that the tribunal has said "The Act makes distinction between a person who occupies a position of profit under the Government of a State and a person serving under the Government of the State. In the Constitution of India Art. 102(1) (a) the words used are "office of profit under the Government" while under section 123(8) Representation of People Act, the words are "persons serving under the Government."

34. We are, therefore, of opinion that the words "holding on of office of profit under the Government" are wider than the words "persons serving under the Government." A person may not be directly in the service of the Government but still he may hold an office which may be directly or indirectly under the control of Government and it may amount to an office of profit under the Government. Therefore the cases relied upon dealing with the provisions of section 123(8) of the Representation of People Act are not helpful in deciding the case which is directly concerned with a case of a person alleged to be holding an office of profit under the Government within the meaning of Art. 102 of the Constitution of India. The cases cited by the counsel for the opposite-party mostly related to cases dealing with section 123(8) of the Representation of People Act.

35. A case reported in 4 E.L.R. page 466 was relied upon by the opposite-party. This case is not applicable to the facts of the present case because it was a case dealing with the provisions of section 7(e) of the Representation of People Act 1951, and not with Art. 102 of the Constitution of India. It was held in that case that the Punjab University constituted under the East Punjab University Act, 1947 is not "a corporation in which the Government has any financial interest" within the meaning of section 7(e) of the Representation of People

Act. Even though it receives a substantial annual grant from the Government, its accounts are examined and audited by the Government, it uses service postage stamps, its funds are deposited in banks approved by the Government, the Governor is the Chancellor and the Vice Chancellor is also appointed by the Government; and a person who holds an office of profit under the university is not therefore disqualified from standing for election under section 7(c) of the Act.

36. A half hearted attempt was also made to show with reference to Art. 58 of the Constitution of India that a person holding any profit or profits under the Government is only debarred from contesting the office of President of the Union of India. This argument ignores the provisions of Art. 102 which directly deals with the subject of a person holding an office of profit under the Government to be disqualified from being chosen as and for being a member of either House of Parliament. Section 7(e) of the Act runs as follows:—

> "A person shall be disqualified for being chosen as and for being a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State.
>
> (e) if he is not a director or managing agent of or holds any office of profit under any corporation in which the appropriate Government has any share or financial interest."

37. We, therefore, are of opinion that for the purposes of determining whether a person holds an office of profit under the Government, a case which deals with the aspect under sec. 7(e) is not helpful and relevant. In the present case, we find that the Dargah has been under the control and supervision of the Government and has been a concern which has been directly under the management of the Government. The different enactments which have been enacted from time to time for the proper control and management of Dargah affairs clearly show that it has been the business of the Government to look after the affairs of the Dargah. Now, under the present Act the Government is controlling body as we find from the provisions of the present Act in force that the management is being done subject to the control of the Government. Even the bye-laws which are to be made by the committee appointed under the Act are to be approved by the Government. Accordingly, it is possible that the appointment, dismissal and other affairs connected with the employment of the servants and other employees of the Dargah may form the subject matter of the bye-laws. It is in evidence that previously one Abdul Bari Mani was working as a Mohatmim of the said Madarsa which he did upto 1951 and he was in the service of Nizam of Hyderabad. Abdul Bari Mani handed over the charge of the Madarsa to the Dargah Committee with some funds which were lying with him. The administrator after taking charge of the school issued notices to all the staff of the Madarsa terminating their services from 16 July 1951 and re-employing them as Dargah Servants from 16th July 1951 *vide* Ex. P/21 and P/22. The control of the Government has become stricter by the present Act as the committee members are all nominated by the Government. The principal official *i.e.* first Nazim was appointed by the Central Government. Other Nazims are to be appointed by the Government with the consultation of the committee. The Government may supersede the whole committee and under sec. 11(c) the powers and duties of the committee include the right to appoint, dismiss and suspend servants of the Dargah endownment. It is therefore clear that the staff of the Dargah was employed by the Dargah as Dargah servants. Kabzul Vasul (receipt book of payments made to the employees of the Dargah and the entries of payment made to the respondent) Ex. P|27 and P|28 clearly show that the payments were made to the employees of the Dargah. Therefore it cannot be said that the opposite party was not the servant or employee of the Dargah. The disqualifications which attached to the members of such committees have been removed by the Prevention of Disqualification Act 1, 1954. Section 4 of the Act says (a) "It is hereby declared that the following offices shall be deemed nevertheless to have disqualified and shall not if held for any period exceeding beyond 30th April 1954 be deemed to disqualify the holder thereof as a member of Parliament; (b) the offices of chairman, director, member and officer of a statutory body where the power to make any appointment to any such offices or the power to remove any person therefrom is vested in the Government." It is, therefore, clear that under the Act, disqualification of the members is removed but not of the employees serving under the committee. This act has been extended from time to time. Similar position was considered in a case of ministers who were exempted from disqualifications but the persons serving under them were treated as persons serving under the Government *vide* Government of India Gazette, 1955, Part 2, Section 3, Extraordinary, page 2431. It is, therefore, clear that the person may

not necessarily be a Government servant and need not necessarily receive any pay from the Government nor he be formerly appointed by any Government. It is sufficient if he can be dismissed by the Government. It is sufficient if he can be dismissed by the Government or by any officer to whom the powers of dismissal have been delegated and that he should work under the control of the prescribed authority and by the exercise of functions discharged by him he should assist his master or employer. A reference to Ex. 11, 12, 14, 15 and 16 shows that the Dargah Committee was trying to withhold some information which might have helped to clear the position. Nevertheless the material on the record of the case is ample and we have no hesitation in coming to the conclusion that the opposite-party was holding an office of profit under the Government at the relevant times, *i.e.* 28th and 29th February, 1956 and 1st March, 1956 and was therefore not qualified to be elected as a member of the Council of State, and we hold accordingly.

38. *Issue No.* 3.—On Issue No. 3, no arguments were advanced by the petitioner and no finding is, therefore, necessary on that issue.

39. *Issue No.* 4 *and* 6.—We have already discussed and given out finding above while dealing with issue No. 2. All the nomination papers have to be looked into simultaneously at one time although the order has got to be passed separately on each and every nomination paper.

40. *Issue No.* 5.—On this issue we hold that the two nomination papers were rightly rejected by the Returning Officer as discussed above under our discussion and finding on Issue No. 2. We are further of view that this could be questioned without filing any recrimination petition.

41. *Issue No.* 7.—Opposite-party Maulana Abdul Shakoor had filed three nomination papers, two on 28th February, 1956, and the third on 1st March, 1956. The two nomination papers filed on 28th February, 1956 were rejected by the learned Returning Officer on the ground that the opposite party was holding an office of profit under the Government on the date the nomination papers were filed. He accepted the third nomination paper as he held that there was no disqualification attached to the candidate on 1st March, 1956 *vide* Ex. P/7. This information was published in the Times of India a daily news paper dated 14th March, 1956 as well as Reshtradoot a daily news paper dated 14th March 1956. The electoral college for this election consisted of 30 members (Ex.P/9). The petitioner as his own witness has stated on oath that he personally approached each and every member of the electoral college and he brought the fact of rejection of the two nomination papers on the ground that the opposite-party was holding the office of profit under the Government. He also told them that the respondent was getting Rs. 100/- per month as Mohatmim in the school run by the Dargah and that the Dargah was administered by the Central Government. The petitioner also stated in his evidence that merely all the members of the electoral college told him that they knew that Maulana was employed as a Mohatmim of the school run by the Dargah which was administered by the Central Government. We have no ground to disbelieve this evidence as it has not been contradicted by anybody. Not a single member of the electoral college was produced to rebut this evidence which could very easily have been done if this was not true. The petitioner is an advocate of good standing and we are not prepared to disbelieve the statement given by him on oath. Accordingly, we find that the facts which according to us disqualified the opposite-party from being elected as a member of the Council of States or Rajya Sabha were known almost to every member of the electoral college. Only Shewaram was not approached by the petitioner. Every other member was approached by him. By a reference to Halsbury's Laws of England Volume 12 at page 137 we find that it is laid down "By the common law the principle seems to be firmly established that where a candidate is in point of fact disqualified at the time of election all votes given to him with the knowledge of the fact upon which such disqualification is founded must be considered to be thrown away." The knowledge may be established by direct notice or by notoriet and it will in all cases be inferred that where a voter is aware of the facts he is aware of the legal consequences. From these facts however, intricate and involved, such deductions may be. This point also arose in a case reported in Dobia's Election Cases Volume 1, page 178. In this case one Mr. Lathe one of the candidates was nominated and the nomination was accepted as members of the legislative assembly. Even in spite of the objection on the date of scrutiny the nomination was accepted. It was held in this case that Mr. Lathe's disqualification was deemed to be patent fact of which the elector must be held in law to be aware. The electors were aware that Mr. Lathe was a member of the legislative assembly hence all the votes given to him were treated as thrown away. On behalf of the opposite party it was urged that if the facts were complicated and involved, and the deductions from them also

in law are complicated and involved, then in such case the vote should not be treated as thrown away. He further urged that in the present case the Returning Officer himself was pleased to dismiss the two nomination papers, but he accepted one of them and the points involved in the case being very difficult and complicated, the votes should not be deemed thrown away which were cast in favour of the opposite-party. It makes no difference whether the deductions in law are complicated or involved because everybody is presumed to know the law. The facts were simple. The opposite-party was a Mohatmim in the Madrasa Darul-uloom under the control of the Dargah committee which was established by a statute enacted by the Government. The provisions of the statute are deemed in law to be known by every body and if the fact of the opposite-party's acting as Mohatmim in the said school makes him a person holding an office of profit under the Government it must be deemed that the members of the electoral college knew that this was so. We hold that the votes cast in favour of the opposite-party should be deemed to be thrown away. We have already held above that the opposite-party held an office of profit under the Government and was accordingly disqualified both on 28th February, 1956 and 1st March, 1956. The order of the Returning Officer holding the third nomination paper presented on 1st March, 1956 was not proper as according to us the change in the statute did not make any difference between the position as it existed on 28th February, 1956 and 1st March, 1956. Even the learned counsel for the opposite-party maintained that so far as the previous and the present statutes governing the Dargah endowment was concerned there was no difference in the management of the Dargah through these enactments. Although he argued that according to all the Acts the opposite-party could not be deemed to be holding an office of profit under the Government and according to him the rejection of the two nomination papers filed by the opposite-party on 28th February, 1956 was wrong. A reference may be made to Gazette of India, 1955 Part 2 section 3 extraordinary page 1415. At page 1419 it is laid down "that the votes cast for a person whose election is set aside on the ground of disqualification then the votes should be considered to be thrown away. It was argued by the learned counsel for the opposite-party that the opposite-party was a nominee of the Congress and the Congress members were majority of voters in the electoral college and that the majority of votes were cast in favour of the opposite-party. If the majority of votes are to prevail then the intention of such orders should be expressed in a particular manner as required by Law and the constitution which can be taken into account only if it is so expressed. An intention not duly expressed is in a court of law in the same position as an intention not expressed at all. We accordingly hold that the votes cast in favour of Maulana Abdul Shakoor are to be deemed as thrown away votes. The necessary result of this is that the petitioner has obtanied all the valid votes.

42. In Ex. 10 it is shown by the Returning Officer that the valid votes obtained by Maulana Abdul Shakoor were 19 and by Shri Rikab Chand they were 7 only. 3 were invalid votes. As we have held above that the number of votes cast in favour of Maulana Abdul Shakoor are all to be treated as thrown away votes, they cannot be considered at all to say nothing of their being valid. They were certainly valid so far as the Returning Officer was concerned but the position being different now they are not to be taken into account at all.

43. *Issue No.* 8.—We find that the opposite-party was not qualified to be elected as a member as he held an office of profit under the Government. His nomination was accepted in spite of an inherent disability. This amounts to non-compliance with the provisions of the Constitution of India. In 1954 Supreme Court at page 520 we find that it is laid down as follows:—

> "If the want of qualification of a candidate does not appear on the face of the nomination paper or on the electoral roll, is a matter which can be established only by evidence, and an enquiry at the stage of scrutiny of the nomination paper is required under the Act only if there is any objection to nomination. The Returning Officer is then bound to make such enquiries as he thinks proper on the result of which he could either accept or reject the nomination. But when the candidate appears to be properly qualified on the face of the electoral roll and the nomination paper and no objection is raised to the nomination, the returning officer has no other alternative but to accept the nomination. This would be apparent from section 36(7) of the Act, under which the electoral roll is conclusive as to the qualification of the elector except where a disqualification is expressly alleged or proved. The acceptance of the nomination paper by the Returning Officer in the latter case must be deemed to be proper acceptance. It is certainly not final and the Election Tribunal may

on evidence placed before it come to a finding that the candidate was not qualified at all but the election should be held to be void on the ground of Constitutional disqualification of the candidate and not on the grounds that his nomination was improperly accepted by the Returning Officer. Case of this description comes under sub-section 2(c) of section 100 and not under section 1(c) of the section as it really amounts to holding election without complying with the provisions of the Constitution. The expression "non-compliance with the provisions of the Constitution" under section 100(2)(c) is sufficiently wide to cover such cases. Where the question is not one of improper acceptance or rejection of the nomination by the Returning Officer but there is a fundamental disability in the candidate to stand for election at all."

44. When a person is incapable of being chosen as a member of a State Assembly under the provisions of the Constitution itself but has nevertheless been returned as such at the election it can be said without impropriety that there has been non-compliance with the provisions of the Constitution materially affecting the result of the election.

45. When a person is not qualified to be elected a member there can be no doubt that the election tribunal has got to declare his election to be void, which we hereby do.

46. Under section 98 of the Act this is one of the orders which the election tribunal is competent to make.

47. The said ruling further lays down that if it is said that section 100 of the Act enumerates exhaustively the grounds on which an election could be held void or as a whole or with regard to the returned candidate, we think that it could be a correct view to take that in the case of a candidate who is constitutionally incapable, of being returned as member there is non-compliance with the provisions of the Constitution in the holding of the election and as such sub-section 2(c) of section 100 of the Act applies.

48. Moreover there were two candidates only. When the nomination of the opposite-party has been held by us to be invalid and if he accordingly walks out, then under section 53 of the Representation of People Act, it is the petitioner alone who is entitled to be declared as duly elected *vide* Doabia's Election Cases Volume I page 99 case No. 17. The tribunal's and the returning officer's powers are co-extensive *vide* 1955 Supreme Court 233, head-note(t).

Hence the tribunal is entitled to declare the petitioner duly elected, which we hereby do.

(Sd.) SWAROOPNARAIN AGARWAL, *Member*,

(Sd.) G. D. BADGEE, *Member*.

The 31st January, 1957.

C. Jacob (*Chairman*)

49. Petitioner Shri Rikhab Chand Jain has filed this petition under section 81 of the Representation of the People Act, 1951, praying that the election of respondent Maulana Abdul Shakoor to the Council of State by the members of the Ajmer Legislative Assembly may be declared to be void and that he may be declared duly elected.

50. The petitioner and the respondent were the only two candidates nominated for the election. The respondent filed three nominations, two on 28th February 1956 and the third on 1st March 1956, which was the last date for filing nominations. Against these nominations of the respondent, the petitioner filed objections and his main objection was that the respondent was getting Rs. 100 p.m as an employee of the school run by Durgah Khwaja Sahib, Ajmer, which was administered by the Government of India through the Administrator and as such the respondent was holding office of profit under the said Government and was, therefore, disqualified to be elected as member of the Council of State under Article 102(1)(a) of the Constitution of India. The Returning Officer by his order dated 6th March 1956 which is on record as Exh. P/7 held that the respondent was holding an office of profit under the Government as Manager of the school run by the Durgah till 19th February 1956 upto when the Durgah

Khwaja Sahib (Emergency Provisions) Act 1950, was in force, but he ceased to hold such office from 1st March 1956, when the new Durgah Act (Act XXXVI of 1956) came into force. The Returning Officer, therefore, rejected the first two nomination papers of the respondent and accepted the third nomination paper of 1st March 1956. The nomination paper of the petitioner was also accepted by him. The election took place on 22nd March 1956 and as the respondent received majority of valid votes he was declared duly elected. The petitioner has now challenged the election of the respondent on the same ground, which he had taken up before the Returning Officer. It has also been pleaded by the petitioner that he being the only validly nominated candidate, the votes cast in favour of the respondent should be treated as "thrown away" and he (petitioner) was, therefore, entitled to be declared duly elected. The respondent admitted that he was the Mohatmim of the school (Madarsa), which was initially run by the Nizam of Hyderabad and as he was getting Rs. 100 p.m. as honorarium which too he relinquished from 1st March 1956, he was not holding any office of profit. He further pleaded that even as an employee of the Durgah Endowment he could not be treated as holder of profit under the Government and was therefore not disqualified under Article 102(1)(a) of the Constitution of India.

51. On various pleadings, eight issues were framed which have already been reproduced in the order of my learned colleagues.

FINDINGS

52. *Issue No.* (1).—This issue was not argued by the learned counsel for the respondent. In fact, it is not open to the respondent to question the validity of the petitioner's nomination without any recriminatory petition as envisaged by section 97 of the Representation of the People Act.

53. *Issue No.* (2).—This issue calls for consideration of three points, *viz.*, (i) whether the post of Mohatmim of the Madarsa was an office, (ii) whether it is an office of profit, and (iii) whether it was held under the Government. So far as the first two points are concerned, I decide them in the affirmative and hold that the respondent as Mohatmim was holding office of profit. I need not discuss the matter over again as I agree with the reasoning and findings of my learned colleagues on these two points.

54. The important question now to be decided under this issue is whether the office held by the respondent was under the Government. Prior to coming into force of the Durgah Khwaja Sahib Act of 1955, the administration of the Durgah Endowment vested in the Administrator appointed by the Central Government under Section 3 of the Durgah Khwaja Sahib (Emergency Provisions) Act, 1950. Under Section 7 of that Act, the Administrator, subject to the control of the Central Government, exercised all the powers and discharged all the duties of the Durgah Committee which was formed under the Durgah Khwaja Sahib Act of 1936. The Act of 1950 was in force upto 29th February 1956 and thereafter the Act of 1955 came into force. Under section 4 of the present Act, the administration, control and management of the Durgah Endowment vested in a committee known as the Durgah Committee, Ajmer, consisting of members appointed by the Central Government. The Act further provided that the Central Government may, in consultation with the Committee, appoint a person to be the Nazim of the Durgah, but for the appointment of the first Nazim, no such consultation was necessary.

55. The contention of the learned counsel for the petitioner was that the Durgah Khwaja Sahib Act of 1955 did not take away the control of the Central Government over the management of the Durgah administration and the position of all the employees remained the same as it was under the Act of 1950 and, therefore, the Returning Officer had fallen in error in holding that the respondent was holding office of profit under the Government only upto 29th February 1956 and that on coming into force of the Act of 1955 the respondent ceased to hold office of profit within the meaning of Article 102(1)(a) of the Constitution. It was argued by him that the Central Government had full control over the employees of the Durgah Endowment because under clause (1) of Section 11 of the Act of 1955, the Committee had power to appoint, suspend or dismiss servants of the Durgah Endowment. The Committee itself being a creation of the Government, the servants of the Durgah appointed by the Committee could easily be removed at the instance of the Government. In any case, the Government had at least a remote control over the employees of the Durgah. Against this, the learned counsel for the respondent urged that in the first place, the Durgah Endowment was an institution independent of the Government and had its own finances and, therefore, its servants cannot be deemed to be under the Government. Secondly, even under the Durgah Act of 1950, a servant of the Durgah could not be treated as one under the Government, because the Administrator

appointed by the Central Government under that Act exercised the powers of the Committee which was formed by the Act of 1936, and therefore, the Returning Officer's rejecting the first two nomination papers of the respondent was wrong. The third contention of the learned counsel for the respondent was that though the Central Government appoints the Durgah Committee under the Act of 1955, it had no control whatsoever over the employees of the Durgah because powers of dismissal, appointment and removal vested absolutely in the Committee and not in the Government.

56. Considerable case law was cited on behalf of both the parties in support of their respective contentions. The facts of 1 E.L.R. 171, 9 E.L.R. 403, 10 E.L.R. 126 and 4 E.L.R. 422 relied on by the learned counsel for the petitioner are distinguishable from the present case. In all those cases, the appointing authority of the persons concerned was the Government, whereas in the present case, the respondent has not been appointed by the Government but by the Durgah Committee. Similarly, the facts of cases reported in 5 E.L.R. 401, 8 E.L.R. 480 and 4 E.L.R. 466 relied on by the learned counsel for the respondent are different than the present case, as the first two cases were decisions under Section 123 of the Representation of the People Act and the third case was under Section 7(a) of the said Act. However, the reasoning adopted in the third case can by analogy be applied to this case also. No two cases are alike and the question whether the respondent was holding an office of profit under the Government depends upon the facts of this particular case.

57. I find that so far as the first two nomination papers of the respondent are concerned, they were rightly rejected by the Returning Officer. It is clear from a perusal of Section 7 of the Durgah Act of 1950 that the Administrator was not vested with absolute powers of the Durgah Committee, but those powers were to be exercised subject to the control of the Central Government. That being the position, the employees of the Durgah at that time were holding office under the Government. This position was changed by the Act of 1955 and the Committee by virtue of section 4 of that Act was vested with absolute control and management of the Durgah Endowment. Once a Committee was appointed under this Act, the Government can have no hand in the day to day administration of the Durgah Endowment and it has no power of appointment or removal of any servant of the Durgah. No rules have yet been framed under this Act. The Act as it stands gives no power to the Government to appoint and remove servants of the Durgah. It would be giving too wide an interpretation to the word 'under' used in Article 102(1)(a) of the Constitution, if in a case like the present one, it was held that an employee of the Durgah Endowment was holding an office of profit under the Government. Hence, I find that the respondent on 1st March 1956 when his third nomination was filed did not hold an office of profit under the Government.

58. *Issue No.* (3).—This issue was not pressed.

59. *Issue Nos.* (4), (5) *and* (6).—I agree with the findings of my learned colleagues on these issues.

60. *Issue No.* (7).—Since I have held that the respondent was not holding office of profit under the Government, the question of treating the votes obtained by the respondent as "thrown away" does not arise. However, I consider it proper to give a finding on the points covered by this issue also.

61. It was contended by the learned counsel for the petitioner that if the respondent was held to be disqualified for election, then the votes obtained by him should be treated as "thrown away" and the petitioner being the only validity nominated candidate should be declared as duly elected. The petitioner has examined himself and has produced two newspapers in support of his allegation that all the members of the electoral college knew that the respondent's nomination was improperly accepted as he was disqualified for election. He has stated that out of the 30 members of the electoral college, he had occasion to see every member except Sewa Dass and he showed them the Returning Officer's order Exh. P/7 and the copies of the 'Times of India' and 'Rashtra Doot', dated 4th March, 1956 and read those news items Exhs. P|24 and P|25 to them about the rejection of the two nomination papers of the respondent. The petitioner has further stated that he told the members that the respondent was getting Rs. 100 p.m. as a Mohatmim of the school run by the Durgah which was

administered by the Central Government and so he was holding office of profit. The petitioner further told the members that the first two nomination papers of the respondent were rejected on the ground of his holding office of profit and the third should also have been rejected on the same ground. He also told the members that under the present Act all the members of the Durgah Committee and the present Nazim had been nominated by the Central Government. On this information being given to the members, the petitioner went on to say, all the members of the electoral college told him that they knew that the respondent was an employee of the Durgah which was administered by the Central Government. On these facts, the learned counsel for the petitioner argued that the votes given in favour of the respondent should be treated as "thrown away" because they gave the votes knowing fully well the disqualification of the respondent. I am unable to accept this contention. In the first place, it is not possible to believe that the members of the electoral college would have been carried away in this manner by the version of a dejected candidate, specially when they knew the decision of the Returning Officer. The burden of proving this fact was on the petitioner and he has not examined a single member of the electoral college to corroborate his version. The news items Exhs. P/24 and P/25 also cannot be treated as such a strong piece of evidence as to have convinced the voters that they were voting for a candidate whose nomination was improperly accepted. Apart from this, it is not in every case that a vote cast in favour of a candidate who was subsequently held to be disqualified could be treated as a "thrown away" vote. It is only where the disqualification is such that its existence or non-existence does not depend upon arguments, such as the disqualification arising out of a candidate's being infant or an alien. If the disqualification is not clear and is doubtful and difficult and depends upon obscure legal position, the votes secured by the candidate are not to be treated as "thrown away". They can be treated, as such, only when the voters gave their votes for a disqualified candidate in a deliberate and wilfully perverse manner. In the present case, even if it were assumed that the respondent had any disqualification, the votes secured by him should not be treated as "thrown away", because the point involved depended upon interpretation of a difficult question of law and the disqualification, if any, was not *ex facie*. The votes, therefore, obtained by the respondent cannot be treated as "thrown away". Out of the 26 votes cast, 3 were declared as invalid votes and 19 valid votes were secured by the respondent and 7 by the petitioner as mentioned in Exh. P/10. Since the 19 votes cast in favour of the present respondent were valid in point of form and were not vitiated by any corrupt practice, it cannot be held that the petitioner had received all the valid votes. This issue is, therefore, decided in the negative.

62. *Issue No.* (8).—Under this issue, it is to be considered that even if it were assumed that the respondent was disqualified to be elected, should the election be declared void as a whole or only the election of the respondent be declared void and the petitioner be declared duly elected. This depends upon the question whether the present case falls under clause (i)(c) or clause (2)(c) of Section 100 of the Representation of the People Act. The petitioner's contention was that only the election of the respondent should be declared as void because he was constitutionally incapable of being elected and there was, therefore, no compliance of the provisions of the Constitution in the holding of the election and the case was governed by section 100(2)(c). On behalf of the respondent, it was urged that even if the respondent was held to be disqualified, it was a case of improper acceptance of his nomination and the election would have to be declared wholly void under clause (1)(c) of the above mentioned section. Both the parties in support of their respective contention have relied on A.I.R. 1954 Supreme Court 520. In that case, Vasant Rao who was a candidate for the Legislative Assembly of Madhya Pradesh State was described in the electoral roll as having been of proper age and on the face of it he was fully qualified to be chosen as a member. As no objection was taken to his nomination before the Returning Officer at the time of scrutiny, it was accepted. Subsequently, the Election Tribunal found that Vasant Rao was not qualified to be elected, being under 25 years of age. Their Lordships of the Supreme Court held that under those circumstances, it cannot be said that it was an improper acceptance of nomination which section 100(1)(c) contemplated. Their Lordships have further observed that it would have been an improper acceptance if the want of qualification was apparent on the electoral roll itself or on the face of the nomination paper and the Returning Officer overlooked that defect or if any objection was raised and enquiry made as to the absence of qualification in the candidate and the Returning Officer came to a wrong conclusion on the material placed before him. In the present case, an objection was taken before the Returning Officer who made an enquiry and came to a conclusion that the respondent was not qualified. Therefore, it would be a case of improper acceptance

and would be governed by clause (1)(c) of Section 100 of Representation of the People Act. The observations in the last paragraph of the above mentioned judgment are based on the facts of that particular case in which no objection before the Returning Officer was taken and it was held that sub-section 2(c) of Section 100 applied. I, therefore, find that the present case was of improper acceptance of the nomination, assuming that the respondent was disqualified. There can be no doubt that the result of the selection has been materially affected by the improper acceptance, if any, because a candidate disqualified to be elected has been declared as elected. The election should, therefore, be declared to be wholly void under Section 100(1) (c) of the Act.

63. The learned counsel for the petitioner urged that the powers of the Tribunal were co-extensive with those of the Returning Officer and, therefore, in view of section 53 of the Representation of the People Act, the petitioner, even though he has obtained only seven valid votes out of the twenty-six cast, he should be declared as duly elected. This contention has lost its force in view of my finding that section 100(1)(c) of the Act would apply to the present case.

64. As a result of my above findings, the petition deserves to be dismissed as the respondent was not disqualified under Art. 102(1)(a) of the Constitution. Even if it were held that the respondent was holding an office of profit under the Government, the election should be declared to be wholly void and the prayer of the petitioner to be declared duly elected should be dismissed.

(Sd.) C. JACOB,
Chairman.

ORDER OF THE TRIBUNAL

65. In pursuance of the majority decision by the two members of the Tribunal, the respondent's election is declared void and the petitioner is declared duly elected to the Council of State. The election petition is accordingly allowed. The respondent shall pay Rs. 300 as costs to the petitioner.

(Sd.) C. JACOB, *Chairman.*
(Sd.) S. N. AGARWAL, *Member.*
(Sd.) G. D. BADGEL, *Member.*

31*st January*, 1957.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL No. 335 OF 1957

Maulana Abdul Shakoor—*Appellant.*

VS.

Rikhab Chand and another—*Respondents.*

JUDGMENT

Kanpur J.—This is an appeal from the order of the Election Tribunal dated January 31st, 1957, setting aside the election of the appellant, Maulana Abdul Shakoor, who was elected to the Council of States by the Electoral College of Ajmer which consisted of 30 members constituting the State Legislature of Ajmer. He received 19 votes as against 7 polled in favour of the other candidate who is respondent No. I in this appeal. The total number of valid votes polled was 26 and there were 3 invalid votes. The result of the election was published in the official Gazette on March 31, 1957, declaring the election of the appellant. The unsuccessful candidate, the present first respondent filed his election petition on May, 2, 1956. It is not necessary, to set out all the allegation in the petition because the main controversy between the parties is whether the successful candidate, the present appellant, held an "office of profit" under the Government. The impugned election was held on March 22, 1956

By a notification issued on February, 17, 1956, the nominations for candidature were to be filed between February 28, 1956, and March, 1, 1956. The date for scrutiny was March 5, 1956, and for the polling March 22, 1956. The appellant filed two nomination papers on February 28, 1956, and a third one on March 1, 1956. The respondent Rikhab Chand Jain also filed his nomination papers on March 1, 1956. On March 5, 1956, the respondent Rikhab Chand Jain raised

certain objections to the validity of the appellant's nomination, the main ground being that the appellant was holding an office of profit under the government. The Returning Officer by his order dated March 6, 1956, rejected the two nomination papers of the appellant filed on February 28, 1956, but accepted the third one, *i.e.*, of March 1, 1956, because, according to that officer, under the provisions of Durgah Khwaja Sahib (Emergency Provisions) Act, 1950 (Act XVII of 1950) which was in force upto 29th February, 1956, the appellant was holding an office of profit under the government but on the coming into force of the Durgah Khwaja Sahib Act (Act XXXVI of 1955), on March 1, 1956, he no longer held such office under the government. On May, 3, 1956, the respondent filed an election petition under Section 81, of the Representation of People Act 1951, in which he submitted that the third nomination paper of the appellant should also have been rejected as even under the provisions of Durgah Khawaja Sahib Act (Act XXXVI of 1955), the appellant was holding an office of profit under the government and therefore his case was covered by the provisions of Art. 102 (i) (a) of the Constitution. He also prayed that he be declared elected as the votes cast in the appellant's favour were "thrown away" votes and the respondent alone received a majority of valid votes.

A majority of the Election Tribunal by their order January 31, 1957 held that on March 1, 1956, the appellant was holding an office of profit under the government and therefore his nomination paper was hit by Art. 102(i)(a) of the Constitution. They set aside his election and accepting the contention as to "thrown away" votes declared the respondent elected. Disagreeing with the majority, the Chairman of the Election Tribunal held that on March 1, 1956, the appellant was no longer holding an office of profit under government, his nomination paper was rightly accepted and his election was valid and therefore the respondent could not be declared elected. On the question whether the two nomination papers of the appellant dated February 28, 1956, were valid or not the Tribunal unanimously held them to be invalid on the ground that the appellant held an office of profit under the government on that date.

It is not necessary to go into the question whether the two nomination papers filed by the appellant on February 28, 1956, were valid or not because if the nomination paper filed on March 1, 1956, is valid the question of their validity would not arise. It may here be stated that the argument before us has proceeded on the assumption that the appellant held an office of profit. The controversy between the parties was therefore confined to whether this office of profit was held under the Government of India and therefore the disqualification for membership under Art. 102(i)(a) applies to the appellant. In order to resolve this controversy the important question of construction that arises is: was the appellant holding an office of profit under the Government of India and does Art 102(i)(a) of the Constitution operate? This article is as follows:—

> 102(i) "A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—
>
> (a) If he holds any office of profit under the Government or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder:"

This article occurs under the heading Disqualification of members. In the same part of Constitution *i.e.*, part V are given the disqualifications for election to the offices of President and Vice-President. The relevant part of Art, 58 which lays down the disqualification for the office of the President is:—

> Art. 58(1) "No person shall be eligible for election as President unless he—
>
> (a) .....
>
> (b) .....
>
> (c) .....
>
> (2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or *under local or other authority subject to the control of any of the said governments*".

There is a similar provision in regard to the Vice-President in Art. 66(4).

Counsel has rightly pointed out the difference in the language between the two articles. Whereas in the case of the President and Vice-President the holding of an office of profit under an authority subject ot the control of the

Government is a disqualificatian, it is not so prescribed in the case of members of the legislatures.

The Madarsa Durgah Khwaja Sahib Akbari in which the appellant holds the appointment of a manager (mohatmin) is a school for teaching persian, arabic and Muslim theology. Before 1951 it was managed and run by the Government of the Nizam of Hyderabad. In 1951 this school was taken over by the Dargah Committee. On February 28, 1955, the appellant was given an honorary appointment of mohatmin (manager) of the school by the Administrator of Durgah Khwaja Sahib. He was to work under the Administrator and was to hold charge of the management of the school. But from May, 1955 he was being paid Rs. 100 per month which has been variously described as salary and honorarium.

Counsel for the appellant raised three questions of construction that this appointment as manager of the school amounted neither to an office nor to an office of profit nor to an office of profit under the government. A decision favourable to the appellant on the last question *i.e.*, office of profit under the government, would render the decision of the other two questions wholly unnecessary and therefore assuming that the appellant held on office of profit, the question remains: was it an office of profit under the government and therefore fell within Art. 102(i)(a) of the Constitution? In order to determine this we have to examine the provisions of the Statute under which the appointing authority came into existence and its powers under the Statute. Before and upto 1936 the Durgah Khwaja Sahib Endowment was administered by a committee which was constituted by the Chief Commissioner of Ajmer under s. 7 of the Religious Endowment Act (Act 20 of 1863). In 1936 the then Central Legislature enacted the Durgah Khwaja Sahib Act (Act 23 of 1936). By the provisions of that Act the management and administration was vested in Durgah Committee constituted under Section 4 of the Act. It was a body corporate with perpetual succession and common seal having the right to sue and be sued in the name of the president of the Committee. Under Section 5 which dealt with the constitution of the committee it was to consist of 25 members some of whom were elected and some nominated. Section 11(f) of the Act gave to the Committee the power to appoint all its servants.

The Act of 1936 was replaced by the Durgah Khwaja Sahib (Emergency Provisions) Ordinance 3 of 1949, which in turn was replaced by the Dargah Khwaja Sahib (Emergency Provisions) Act (Act 17 of 1950). By s. 3 of the Act the Durgah Committee constituted under the Act of 1936 was superseded and the management was vested in an Administrator appointed by the Central Government who under s. 7 was to be under the control of the Central Government and had all the powers of the committee constituted under the Act of 1936. That Act continued to be in force upto February 29, 1957 and it was during its continuance that the appellant filed two nomination papers on February 28, 1956 which were rejected by the Returning Officer.

The Act of 1950 was replaced by the Durgah Khwaja Sahib Act (Act XXXVI of 1955) which received the assent of the President on October 14, 1955 but came into force on March 1, 1956. Under s. 4(i) of this Act the administration, control and management of the Durgah Endowment came to be vested in a committee, which is a body corporate having perpetual succession and common seal and which can sue and be sued through its president. Under s. 5 the Committee is to consist of not less than 5 and not more than 9 members of the Hanfi Muslim faith all of whom are to be appointed by the Central Government. Section 8 gives power to the Central Government to supersede the Committee. Under s. 9 the Central Government in consultation with the committee can appoint a Nazim (administrator) of the Durgah who is an *ex-officio* secretary of the Committee. His salary is to be fixed by the Central Government but is to be paid not of the revenues of the Durgah Endowment Funds. The committee exercises its powers of administration, control and management through the Nazim. The powers and duties of the committee are given in s. 11 of the Act; clause (i) of this section which is relevant for the purpose of this case when quoted runs as under:—

S. 11 "The powers and duties of the Committee shall be—

.....

(i) to appoint, suspend or dismiss servants of the Durgah Endowment".

Under s. 20 the Committee has the power to make bye-laws to carry out the purpose of the Act, and the respondent emphasised clause (i) of sub s. 2 which provides:

s. 20(2) "In particular and without prejudice to the generality of the foregoing power such bye-laws may provide for:

(i) the duties and powers of the employees of the Durgah.

Sub-section 5 of this section is as follows:—

(i) The Central Government may, after previous publication of its intention, cancel any bye-law which it has approved and confirmed, and thereupon the bye-law shall cease to have "effect".

The respondent contended that because under the Act of 1955 the Committee of Management is to be appointed by the government who also appoint the Nazim (administrator) through whom the committee acts and because under s. 8(2) the government has the power of removal from office of any member of the committee and because the committee can make bye-laws prescribing the duties and powers of the employees of the Durgah, the appellant was under the control and supervision of the Central Government and therefore he was holding an office of profit under the Government of India. It is significant to note that in laying down the disqualifications of the President and the Vice-President the constitution has expressly provided the disqualifications which include not only an office of profit under the Government of India or the Government of any State but also an office of profit under any local or other authority subject to the control of any of the said Governments. This last disqualification the constitution does not make applicable to the members of the legislature.

No doubt the Committee of the Durgah Endowment is to be appointed by the Government of India but it is a body corporate with perpetual succession acting within the four corners of the Act. Merely because the committee or the members of the committee are movable by the Government of India or the committee can make bye-laws prescribing the duties and powers of its employees cannot in our opinion convert the servants of the committee into holders of office of profit under the Government of India. The appellant is neither appointed by the Government of India nor is removable by the Government of India nor is he paid out of the revenues of India. The power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment from out of Government revenues are important factors in determining whether that person is holding an office of profit under the Government though payment from a source other than government revenue is not always a decisive factor. But the appointment of the appellant does not come within this test.

A number of election cases reported in the Election Law Reports were cited before us but they were decided on their own facts and are of little assistance in the decision of the present case. The test of the power of dismissal by the government or by an officer to whom such power has been delegated which was pressed in support of his case by the respondent is equally inapplicable to the facts of the present case because the appellant cannot be dismissed by the government or by a person so authorised by the government. He is a servant of a statutory body which in the matter of its servants Act within the powers conferred upon it by the statute.

The respondent then sought to fortify his submissions by relying on *Shivnandan Sharma* vs. *The Punjab National Bank Ltd.*, (1) (1955 I.S.C.R. 1427). That was a case under the Industrial Disputes Act and the question for decision was whether a cashier appointed by the Bank's treasurer on behalf of the Bank and paid by the Bank was a servant of the Bank. It was held that he was. The rule of that case is that if the master employs a servant and authorises him to employ a number of persons to do a particular job and to guarantee their fidelity and efficiency for cash consideration, the employees thus appointed by the servant would be, equally with the servant, servants of the master. But that again has no application to the facts of the present case because the appellant has not been employed by a servant of the government who is authorised to employ servants for doing some service for the government nor is he paid out of the Indian revenues. No doubt the non-payment from out of the revenues of the Union is not always a factor of any consequence but it is of some importance in the circumstances of this case.

A comparison of the different articles of the constitution 58(2), 66(4), 102(1)(a) and 191(1)(a) dealing with membership of the State Legislatures shows in the case of members of the legislatures unlike the case of the President and the

Vice-President of the Union the disqualification arises on account of holding an office of profit under the Government of India or the governments of the States but not if such officer is under a local or any other authority under the control of those governments. As we have said the power of appointment and dismissal by the government or control exercised by the government is an important consideration which determines in favour of the person holding an office of profit under the government, but the fact that he is not paid from out of the State revenue is by itself a neutral factor.

It has not been shown that the appellant's appointment as a *mohatmin* (manager) of the school satisfies any of the tests which have been discussed above. On the other hand on March 1, 1956 he was holding his appointment under a Committee which is statutory body and such appointment cannot be called an appointment by or under the control of the Government of India nor is his salary paid out of the revenues of the government but out of the funds of Durgah endowment. In the circumstances the majority of the tribunal has erred in holding that the appellant hold an office of profit under the government and the opinion of the Chairman to the contrary lays down the correct position.

In view of this finding in regard to the office of profit under the government, it is not necessary to go into question whether there were any "thrown way" votes or whether the respondent has been rightly declared to have been elected.

We are of the opinion that the election of the appellant has been wrongly set aside and we would allow the appeal and set aside the order of the majority of the tribunal. The appellant will have his costs in this court.

(Sd.) S. R. DAS .....C.J.
(Sd.) T. L. VENKATARAMA AIYAR.....J.
(Sd) B. P. SINHA ..... J.
(Sd.) J. L. KAPUR ..... J.
(Sd.) A. K SARKAR ..... J.

Dated September, 12 1957.

[No. 82|2|56.]

By Order,

DIN DAYAL, Under Secy.

PRINTED IN INDIA BY THE GENERAL MANAGER, GOVT. OF INDIA PRESS, NEW DELHI AND PUBLISHED BY THE MANAGER OF PUBLICATIONS, DELHI, 1957